

IN RE:) In Proceeding
) Under Chapter 11
S.I. BOWLING & RECREATION)
CENTER, INC.,) BK 90-41135
)
Debtor.)

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease,

may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

11 U.S.C. § 365(d)(2).¹ The debtor argues that Bayer's motion to gain possession of the leased property is premature. Relying on Matter of Whitcomb & Keller Mortg. Co., Inc., 715 F.2d 375 (7th Cir. 1983) and Matter of Reda, Inc., 54 B.R. 871 (Bankr. N.D. Ill. 1985), the debtor argues that Bayer's only recourse is to move the Court to order the debtor to either assume or reject the lease within a specified period of time pursuant to 11 U.S.C. § 365(d)(2).

The cases relied on by the debtor are distinguishable from the instant case. The courts in Whitcomb and Reda both ruled on the treatment of executory contracts under § 365. While § 365 prescribes identical treatment for executory contracts and residential leases, § 365(d)(4) was added by the Bankruptcy Amendments and Federal Judgeship Act of 1984, specifying different treatment for non-residential leases like the one in this case.

§ 365(d)(4) provides:

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential

¹Pursuant to 11 U.S.C. § 1107(a), S.I. Bowling, as debtor in possession, has the same authority to assume or reject the lease that a trustee would have under § 365(d)(2).

real property to the lessor.

11 U.S.C. § 365(d)(4).

The debtor never formally assumed nor rejected the lease with Bayer within the 60-day period after the order for relief.² Neither did the debtor assume the lease by its actions; "an express order of the judge approving an assumption or rejection is required." In-re Speed Fab-Crete of Nevada, 57 B.R. 720 (Bankr. D. Nev. 1986). Therefore, the lease is deemed to have been rejected pursuant to § 365(d)(2). Bayer is entitled to immediate possession of the property.

Bayer also asks for a declaration that the debtor is not entitled to any improvements located on the land in question. Bayer states in its motion that the agreement permits the lessee to remove improvements. However, the written lease agreement does not appear in the record before the Court. No evidence was presented as to the substantive provisions of the lease or the intentions of the parties. Neither was any evidence presented identifying the improvements that are at issue. Therefore, the Court will not rule on that issue in this proceeding.

IT IS ORDERED that the Bayer Company's Motion for Possession is GRANTED in part and DENIED in part. The debtor is to surrender possession of the property immediately. However, the Court declines to rule on the debtor's right to remove improvements, pending the

²The commencement of a voluntary case under any chapter of title 11 constitutes an order for relief. 11 U.S.C. § 301.

filing of appropriate pleadings and the presentation of evidence upon which the Court can make such a determination.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: April 16, 1991